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**84-1759**

No._____

In The
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

T.G.&Y. STORES, INC.,
*Petitioner,*

vs.

SOLOMON LUSBY, VAUGHN LUSBY
and ALVIN JERARD LUSBY,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1985

HAPP

## QUESTIONS PRESENTED

#1. Whether action under color of state law is present under 42 U.S.C. §1983 when a private mercantile establishment files a citizen's complaint against a suspected shoplifter in a municipality wherein the local police department has created a uniform internal policy of not independently investigating such citizen's complaints filed by private mercantile establishments prior to taking custody of that suspected shoplifter?

#2. Whether action under color of state law is present under 42 U.S.C. §1983 when a private mercantile establishment seeks to obtain a release of all civil liability from a suspected shoplifter in exchange for the dismissal of all criminal charges brought by way of a citizen's complaint against that suspected shoplifter?

## PARTIES INVOLVED

The Petitioner herein, the defendant-appellant below, is T.G.&Y. Stores, Inc., a corporation incorporated in the State of Delaware, with its principal place of business being in the State of Oklahoma. T.G.&Y. Stores, Inc., is correctly named T.G.&Y. Stores, Co., and is a wholly owned subsidiary of Household Merchandising, Inc. Additional defendants-appellants were the City of Lawton, Oklahoma, a municipal corporation organized and existing under the laws of the State of Oklahoma, Charles Gent, who at the time of the pertinent incident was a security guard for T.G.&Y. Stores, Inc., and an off duty policy officer for the City of Lawton, and Steven Wertz and Kent Dunegan, who were police officers for the City of Lawton.

The Respondents, the plaintiffs-appellees below, are Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, individuals who are citizens of the State of Oklahoma.

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-vs-

SOLOMON LUSBY, VAUGHN LUSBY
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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on November 23, 1984.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 749 F.2d 1423 and is reproduced as Appendix "A" hereto. A timely petition for rehearing was denied on January 9, 1985 and the Order of the United States Court of Appeals for the Tenth Circuit is reproduced as Appendix "B" hereto.

## JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 23, 1984. A timely petition for rehearing was denied on January 9,

1985. Mr. Justice White entered an order extending the time for the filing of this petition to and including May 9, 1985. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

## STATUTORY PROVISIONS

42 U.S.C. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

22 O.S. §§1291-1294 provide:

> §1291. Misdemeanor may not be compromised, when
>
> When a defendant is held to answer on a charge of misdemeanor, for which the person by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:
>
> 1. By or upon an officer of justice while in the execution of the duties of his office.
>
> 2. Riotously; or,
>
> 3. With an intent to commit a felony.
>
> §1292. Prosecution compromised, when
>
> If the party injured appear before the court to which the deposition and statement are required to be returned at any time before trial,

on an indictment or information for the offense, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes.

§1293. Compromise of prosecution as bar

The order authorized by the last section is a bar to another prosecution for the same offense.

§1294. Compromise of prosecution forbidden, when

No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in Sections 6113 and 6114 (Sections 1291 and 1292 of this title).

## STATEMENT

The Petitioner, T.G.&Y. Stores, Inc., (T.G.&Y.) is a private corporation, incorporated in the State of Delaware, with its principal place of business being in the State of Oklahoma. This case arises out of an incident which occurred on July 6, 1979 in a T.G.&Y. Store in Lawton, Oklahoma.

On that date Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, arrived at the Sheridan Road T.G.&Y. Store in Lawton, Oklahoma. The evidence at trial indicated that there is some dispute concerning exactly what these three individuals did inside the T.G.&Y. Store, however, it was admitted that Solomon Lusby left the store prior to the other two individuals. Vaughn Lusby indicated that he exited the check out

line twice. The first time through he claimed he purchased a pair of sunglasses. On the second trip through he allegedly purchased some hair spray. The evidence is uncontroverted, however, that Vaughn Lusby was observed exiting the check out stand with a new pair of T.G.&Y. sunglasses which, during this second trip through the check out line, were not paid for.

After Vaughn Lusby exited the store, Charles Gent, a T.G.&Y. security guard, who was also an off duty Lawton police officer, approached Vaughn Lusby and inquired whether he had a receipt for the sunglasses. Mr. Lusby indicated that he did not have such a receipt. At that point Charles Gent displayed a badge and requested that Vaughn Lusby return to the store. According to the testimony, it is T.G.&Y.'s policy to request that a suspect accompany the security officer back into the store so that the investigation can continue.

After the two men returned to the store, as they were proceeding to the rear of the store, Vaughn Lusby raised his voice, allegedly to attract the attention of the cashier who sold him the sunglasses. At this point a struggle erupted which eventually included all three Lusby brothers and several T.G.&Y. employees. The evidence concerning the events that followed is disputed. Eventually, however, the situation was brought under control with the Lusby brothers being taken to the rear of the T.G.&Y. Store. Thereafter, the Lawton Police Department was summoned and officers Wertz and Dunegan arrived at the store to take charge of the suspects. After the Lusbys were taken to jail, Charles Gent traveled to the Lawton police station and completed the necessary paper work relating to the incident. Although various charges were filed against the Lusby brothers, the City of Lawton dropped all charges at a later point in time.

The Respondents originally filed their Complaint in the United States District Court for the Western District of Oklahoma on June 23, 1980 invoking both federal

question and pendent jurisdiction. Included within this original Complaint were numerous theories of recovery among which were false arrest, assault and battery, malicious prosecution and a violation of 42 U.S.C. §1983. This Complaint also charged that Charles Gent had singled out members of Lawton's black community for physical and mental harassment and that T.G.&Y. was aware of his past conduct in this regard. Also included within the original Complaint were allegations against T.G.&Y. and Charles Gent concerning conspiracy and defamation.

The Respondents later filed a Second Amended Complaint restating these allegations previously advanced, which included new allegations to the effect that T.G.&Y. was guilty of grossly inadequate supervision of its security guards. Further, the Respondents alleged that T.G.&Y. surrendered the management of its security guards to an off-duty Lawton police officer who was aware of Charles Gent's racist attitudes and propensities for excessive violence. Finally, the Respondents charged that T.G.&Y. encouraged its security guards to utilize their "dual roles" as police officers to detain suspected shoplifters. At no time did the Respondents contend that any Oklahoma Statute was unconstitutional.

On July 27, 1981, T.G.&Y. and Charles Gent filed a Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment, attached to which were various affidavits attesting to the fact that racial prejudice had never motivated or influenced Charles Gent in the performance of his duties, and further attesting to the fact that T.G.&Y. had no notice of any instance of racial prejudice or excessive use of force attributable to Charles Gent. In the response filed in opposition to this Motion for Summary Judgment, the Respondents failed to offer any evidence demonstrating that T.G.&Y. had any prior notice of any instance where Charles Gent was guilty of racial discrimination and also failed to offer

any evidence demonstrating that T.G.&Y. had any prior notice of any instance where Charles Gent was guilty of excessive use of force. This Motion for Summary Judgment was overruled by the trial court on August 31, 1981.

Following the evidentiary portion of the trial in this matter, which commenced on September 16, 1981, the trial court submitted seven theories of liability to the jury as to each Respondent. On October 1, 1981 the jury returned a verdict in favor of Solomon Lusby against T.G.&Y. for liability on the §1983 claim and the false arrest claim. The total damages awarded against T.G.&Y. were fixed at $4,000.00. The jury returned a verdict in favor of Vaughn Lusby against T.G.&Y. for liability on the §1983 claim, the false arrest claim and the malicious prosecution claim. The total damages awarded against T.G.&Y. were fixed at $66,000.00, of which $50,000.00 was punitive damages. The jury returned a verdict in favor of Alvin Lusby against T.G.&Y. on the §1983 claim and the false arrest claim, fixing his damages against T.G.&Y. at $4,000.00.

T.G.&Y. filed its Motion for Remittitur, New Trial or Judgment Notwithstanding the Verdict, on December 28, 1981, which was later denied by the United States District Court for the Western District of Oklahoma on June 2, 1982. An appeal was commenced by T.G.&Y. to the United States Court of Appeals for the Tenth Circuit, by way of Notice of Appeal filed on June 28, 1982. The principal issues raised by T.G.&Y. on appeal included whether the trial court had erred in allowing the jury to find T.G.&Y. liable under §1983 where plaintiffs failed to offer evidence to support any recognized test for state action as to T.G.&Y., whether §1983 should be extended so far as to impose a federal duty upon a private mercantile corporation to hire, train and supervise employees; and, whether the evidence was sufficient to allow the jury to determine whether a customary plan existed between T.G.&Y. and the Lawton Police Department. The United States Court of Appeals for the Tenth Circuit

affirmed the trial court's judgment by way of its November 23, 1984 Opinion, now reported at 749 F.2d 1423 (10th Cir. 1984).

On December 24, 1984, T.G.&Y. filed a Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit. In this Petition for Rehearing the Petitioner asserted that the Court's opinion as promulgated was inconsistent with the analysis mandated by the Supreme Court of the United States, specifically asserting that the Court's conclusion regarding the alleged customary plan was not supported in the record. (Additionally, the Petitioner asserted that the Court had failed to address one of the critical issues in the appeal, that involving whether T.G.&Y., in relying on the City of Lawton for the training of security personnel, became thereby a state actor. Finally, the Petitioner urged that the Court had acted in contravention of the state law of Oklahoma when it found that the jury had been erroneously instructed as to damages, but found that said error was harmless.) By way of a January 9, 1985 Minute Order, the Petitioner was informed that its Petition for Rehearing was denied.

## REASONS FOR GRANTING THE WRIT

The questions raised in this Petition for Writ of Certiorari have not previously been addressed by this Court. The critical question involved herein is whether a private mercantile establishment, under the facts presented in this case, can properly be found to have acted under color of state law. The Court of Appeals for the Tenth Circuit made two findings in this regard; the first being that T.G.&Y. and its managers acted under color of state law by acting in concert with the Lawton Police Department according to a customary plan for dealing with suspected shoplifters. Secondly, the Court of Appeals for the Tenth Circuit found that T.G.&Y. acted under color of state law when it violated the plaintiffs' constitutional rights in using the threat of criminal charges as a bargaining chip for a release of civil liability.

While this Court has on many occasions considered different aspects of the scope of §1983, this Court has, however, not had occasion to consider the precise questions presented herein. These questions are of extreme importance in determining the extent to which private individuals or entities may find themselves deemed acting under color of state law, and thus, potentially liable under 42 U.S.C. §1983.

## I.

## APPLICABLE CONSTITUTIONAL PRINCIPLES AND DECISIONS OF THIS COURT SUPPORT THE PROPOSITION THAT THE PETITIONER WAS NOT ACTING UNDER COLOR OF STATE LAW.

### A. Decision of the United States Court of Appeals for the Tenth Circuit

Petitioner believes it extremely important to summarize the major findings of the United States Court of Appeals for the Tenth Circuit, found at 749 F.2d 1423 (10th Cir. 1984). The underlying grounds for the bringing of the lawsuit have previously been summarized. However, Petitioner wishes to stress various findings of fact with regard to crucial elements bearing on the question of "color of state law". Critical to this discussion is a summary of the events, as determined by the United States Court of Appeals for the Tenth Circuit, surrounding the arrest of the Respondents.

The Appellate Court found that the security guard working for the Petitioner, after stopping Vaughn Lusby, placed Mr. Lusby under arrest on the spot, before he had any opportunity to question either Mr. Lusby or other witnesses or to ascertain what had happened. Further, the Appellate Court found that the security guard later went to the police station to finish paper work on this incident and used police documents to get information to complete the citizen's arrest forms. With regard to the actions of the Lawton police officers, the

Court of Appeals found that the officers picked up the Respondents, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. These officers relied entirely on the word of the security guard and took these actions before he had completed a citizen's arrest form.

The Court found that the officers made no independent investigation of the shoplifting and that the Lawton Police Chief testified that the police department routinely did not investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. The Court concluded that the police department provided the Petitioner with special forms prepared for merchants who detained suspected shoplifters, which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store without taking the person to jail. The security guard employed by T.G.&Y. was the individual who signed the citizen's arrest form as well as most of the criminal complaints. It is important to note that the Court found that under Oklahoma law (Okla. Stat. Ann. Tit. 22, §§1291-1294) the injured party could have requested the dismissal of the charges for which it received satisfaction. The Court of Appeals also found evidence that the City of Lawton never investigated the incidents charged against the Respondents, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred.

The Court of Appeals recognized that a private entity employing an off duty police officer is not vicariously liable for its employee's deprivation of citizens' civil rights. The Court of Appeals did conclude, however, that T.G.&Y. and its managers acted under color of state law within the meaning of §1983 by acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbid-

den rule or procedure. Specifically, the Court concluded that because Lawton's official policy was to not independently investigate citizens' allegations of misdemeanors prior to arresting suspects for those misdemeanors, the Petitioner had authority to bring its own criminal charges by initiating a citizen's complaint, knowing that the City would not exercise any check on these charges. Thus, the Court of Appeals concluded that the Petitioner exercised a "state inquisitorial right".

The Court of Appeals also concluded that the Petitioner had violated the Respondents' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. More specifically, the Court found the evidence suggested that the Petitioner's policy was always to seek a release of liability as a condition for dropping criminal charges. Further, the Court concluded that the Petitioner had a special form made up that required suspects to confess their guilt and release the Petitioner, its officers and employees from all claims for damages.

### B. Decisions Relied upon by the United States Court of Appeals for the Tenth Circuit

Upon reviewing the opinion of the Court of Appeals, it would appear that the Court relied primarily on a series of decisions from other jurisdictions in order to find that the Petitioner was liable by reason of some concert of action with the Lawton police pursuant to a customary plan for dealing with shoplifters. Specifically, the Court relied upon *El Fundi v. Deroche,* 625 F.2d 195 (8th Cir. 1980); *Duriso v. K-Mart,* 559 F.2d 1274 (5th Cir. 1977) and *Smith v. Brookshire Brothers, Inc.,* 519 F.2d 93 (5th Cir. 1975), *cert. denied,* 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed 2d 320 (1976). The basic holding of each case (decided on its own particular factual situation) was that state action may be found when private security guards act in concert with police officers or pursuant to

customary procedures agreed to by police departments; particularly when a state statute authorizes merchants to detain suspected shoplifters.

It should be noted that the Court of Appeals did not cite any authority in support of its finding that the Petitioner acted under color of state law in using the threat of criminal charges as a bargaining chip for a release of civil liability. The Court of Appeals also relied upon the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982).

### C. Recent Decisions of Importance in Determining the Issues Before this Court

It is well recognized that two elements are necessary to establish a claim under the provisions of 42 U.S.C. §1983. First, the Respondents must prove that the Petitioner has deprived them of a right "secured by the Constitution and laws" of the United States. Second, the Respondents must show that the Petitioner deprived them of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). This second element has been found to require that a plaintiff show that a defendant acted "under color of" state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). The rationale given for imposing such a requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains. This assurance is particularly important where a complaining party seeks to hold the state liable for the actions of private parties. *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982).

The general test for determining whether a private individual has acted under color of state law was articulated by this Court in the case of *Adickes v. S.H. Kress &*

*Co., supra,* 398 U.S. at 152, 90 S.Ct. at 1605, in the context of an equal protection deprivation. This test, in pertinent part, stated:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

The Petitioner asserts that there was no evidence presented in the trial of this action establishing such willful participation in a joint activity with the City of Lawton. Rather, the evidence, even as summarized by the Court of Appeals, was to the effect that the City of Lawton had imposed a uniform policy of noninvestigation for shoplifting complaints of merchants. Further, there was no evidence presented establishing that the Petitioner had any knowledge of such customs, and in particular there was no evidence presented demonstrating any agreement between the Petitioner and the Lawton Police Department. Rather, the evidence presented at trial demonstrated the mere filing of a citizen's complaint by a private individual or entity by use of the exclusive method available.

The effect of the holding of the United States Court of Appeals for the Tenth Circuit is to find that whenever a private individual or entity registers a citizen's complaint with a police department whose internal practice is not to investigate the complaint before taking the accused into custody, that private individual or entity may be found to have been acting in concert with the police department under a customary plan. The Petitioner urges that such a result is totally contrary to the constitutional principles reflected in numerous decisions of this Court, and is an extension of the scope of §1983 far beyond its intended parameters.

A most appropriate warning was voiced by the Federal District Court in *Lee v. Patel,* 564 F.Supp. 755, 760-761 (E.D.Va. 1983):

> If a citizen who has been a victim of a crime, or believes himself to be the victim of a crime, is engaged in State action under color of State law when he swears out a warrant, then he is also engaged in State action when he drives on the right hand side of the highway, or pays his State taxes, or conveys title to an automobile through the State Division of Motor Vehicles, or records the deed to his property, obtains a marriage license or probates his will. Most everything we do in our intercourse with others we do by virtue of or under authority of State law. If *that* is what is meant by action under color of state law then the Bill of Rights, which was intended to protect us from tyranny from the central government, will have proven to be the source of a terrible interference by private citizens in the lives of their fellow citizens through the medium of the federal courts. For this Court to adopt "such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . ." *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972).

Although the Court of Appeals relied upon the case of *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), a case totally factually distinct from the case at bar, this Court's Opinion in that case (footnote 21) explicitly limits the holding therein to a prejudgment attachment case.

The second issue before this Court, as previously stated herein, is whether the Petitioner violated the Respondents' constitutional rights when it used the threat of a criminal charge as a bargaining chip for re-

lease of civil liability. Noticeably absent from the Court of Appeals' Opinion is any citation of authority in support of this finding. The Petitioner asserts that the finding of the Court of Appeals is erroneous, and that the alleged actions of this Petitioner, even if accepted as true, did not constitute an act under color of state law such that the Petitioner came within the provisions of §1983. At most, the alleged actions constituted a misuse of a state statute, that statutory authority being contained at 22 O.S. §§1291-1294. (It should be noted that the statutory provision cited by the Court of Appeals does not vest total control over criminal charges with the complaining party.) This Court, in *Lugar v. Edmondson Oil Co., supra,* 102 S.Ct. 2744, emphasized that a complaint that does not challenge the constitutionality of a state statute but merely alleges misuse of the state statute by a private person does not state a cause of action under §1983 but challenges only private action. This Court noted that private misuse of a state statute does not describe conduct that can be attributed to the State.

Whether the Petitioner did in fact have a special form made up that required suspects to confess their guilt and release the Petitioner, its officers and employees from all claims for damages, and whether the Petitioner attempted to use the threat of criminal charges as a bargaining chip for the release of civil liability under such a form, simply has no bearing on the question of whether the Petitioner acted under color of state law. Although applicable Oklahoma law allowed the Petitioner to bring criminal charges against the Respondents, the potential misuse of that statutory authority does not establish such involvement with the State as to bring the Petitioner within the provisions of §1983. Clearly, the actions of the Petitioner were not such as to be fairly attributable to the State.

## CONCLUSION

The issues brought before this Court are of concern to every private individual and entity in the United States. The decision reached by the United States Court of Appeal for the Tenth Circuit in the instant case has created a situation in which each private individual and entity is potentially liable under the provisions of 42 U.S.C. §1983 although said private individual or entity does not truly act in concert with a state entity. The scope of the protections of 42 U.S.C. §1983, and its application to the conduct of a private individual or entity in the position of the Petitioner herein, are federal questions which should be addressed and resolved by this Court.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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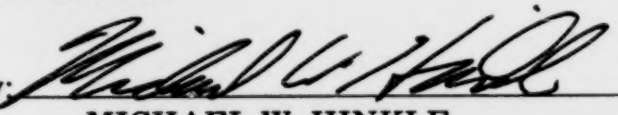
By: 

MICHAEL W. HINKLE
Counsel for Petitioner

May, 1985

# APPENDICES

## Appendix A: OPINION BELOW

Decision of the United States Court of Appeals for the Tenth Circuit filed November 23, 1984, and reported 749 F.2d 1423 (1984)

**[NOTE: Footnotes are set out as endnotes and follow the text of the opinion]**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| | | |
|---|---|---|
| SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees, | ) | |
| v. | ) | Nos. 82-1721 & 82-1779 |
| T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON, OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants. | ) | |

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Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-80-751-W)

---

Russell D. Bennett, City Attorney, (Gerald S. Rakes, Assistant City Attorney, with him on the briefs), Lawton, Oklahoma, for Defendants-Appellants City of Lawton, Steve Wertz, and Kent Dunegan.

Michael W. Hinkle (Page Dobson and Ronald R. Hudson with him on the briefs) of Holloway, Dobson, Hudson & Bachman, Oklahoma City, Oklahoma, for Defendants-Appellants T.G.&Y. Stores, Inc., and Charles Gent.

Gretchen A. Harris (Jack L. Kinzie, also of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Oklahoma, and Linda G. Scoggins of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, with her on the briefs) for Plaintiffs-Appellees.

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Before LOGAN and McWILLIAMS, Circuit Judges, and CAMPOS, District Judge.*

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LOGAN, Circuit Judge.

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*Honorable Santiago E. Campos, United States District Judge for the District of New Mexico, sitting by designation.

These appeals arise out of judgments in favor of plaintiffs Solomon Lusby, Vaughn Lusby, and Alvin Lusby — three brothers — who asserted civil rights and pendent state tort claims against the City of Lawton, Oklahoma, two of its police officers, Kent Dunegan and Steve Wertz, T.G.&Y. Stores, Inc., and Charles Gent, another Lawton police officer who was serving while off-duty as a security guard at a T.G.&Y. store in Lawton at the time of the disputed incidents. The jury returned a verdict for all plaintiffs on their 42 U.S.C. §1983 claims against each of the defendants. On the pendent claims there were differences in the verdicts: on false arrest Solomon and Alvin won against all defendants although Vaughn won only against Gent and T.G.&Y.; on malicious prosecution Solomon and Alvin received a verdict only against Wertz, Dunegan, and the city, and Vaughn succeeded only against Gent and T.G.&Y.; on assault and battery only Alvin prevailed and only against Wertz. The verdict form did not require the jury to separate damages on the particular claims, except among the categories actual, nominal, and punitive. The judgments against each defendant were as follows (all actual damages except as indicated):

| | Solomon | Vaughn | Alvin |
|---|---|---|---|
| Gent | $1,000 | $ 3,000 | $ 2,000 |
| T.G.&Y. | 4,000 | 16,000 & 50,000 punitive | 4,000 |
| Wertz | 2,000 | 1,000 | 2,000 |
| Dunegan | 2,000 | 1,000 | 1,000 |
| City of Lawton | 6,000 | 4,000 | 10,000 |

The jury found for the plaintiffs on defendant Gent's counterclaim for assault and battery. The trial court entered judgment on the verdicts and awarded attorney's fees to plaintiffs pursuant to 42 U.S.C. §1988.

The city and police officers Wertz and Dunegan appeal, contending that the trial court erred (1) in failing to grant a directed verdict in favor of the city and the

officers on the §1983 claims; and (2) in refusing to dismiss the pendent claims because plaintiffs did not comply with the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§151-170. Gent and T.G.&Y. appeal separately, arguing that the trial court erred (1) in refusing to instruct the jury on the qualified immunity Gent asserted as a defense to the §1983 claims; (2) in permitting the jury to find that T.G.&Y. and Gent acted under color of state law for purposes of §1983; (3) in permitting the jury to assess punitive damages against T.G.&Y.; (4) in allowing plaintiffs to introduce evidence of Gent's character from his police personnel file; and (5) in instructing the jury regarding damages for future medical expenses and loss of earning capacity. Additionally, all defendants contend that the trial court erred in awarding attorney's fees in excess of the amount provided under plaintiffs' contingent fee agreement with their attorneys.

I

This dispute arose when plaintiffs stopped at a T.G.&Y. store in Lawton, Oklahoma, on July 6, 1979. Vaughn Lusby and Alvin Lusby entered the store and Vaughn selected a pair of sunglasses. Substantial evidence supports the jury's implicit finding that Vaughn went through the checkout line and paid for the sunglasses, and then decided to return to buy some hairspray. Carrying the sunglasses, Vaughn entered the checkout line again and paid for the hairspray. David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses, but not paying for them. Jamison summoned Charles Gent, an off-duty Lawton police officer employed by T.G.&Y. as a plain clothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him for the receipt for the sunglasses. Vaughn explained that he had paid for the glasses but had lost the receipt. Gent showed Vaughn his badge and told him

that he was a Lawton police officer acting as a security guard and that Vaughn was under arrest for shoplifting. Gent and Vaughn went back inside the store to pursue the matter.

Two altercations then occurred, the precise details of which the parties dispute. Upon reentering the store Gent immediately sought to escort Vaughn to a back room. On the way to the rear of the store Vaughn stopped and raised his voice, apparently in an attempt to get the cashier's attention. Gent grabbed Vaughn around the throat using a chokehold. Vaughn struggled to loosen Gent's grip; then Gent and other T.G.&Y. employees pinned Vaughn. Solomon and Alvin, having entered the store to see what was wrong, saw the T.G.&Y. employees wrestling with their brother and came to his aid. Another struggle ensued. During this struggle Solomon struck Gent and knocked his glasses off, and Alvin shoved Gent. At some point, Gent struck at least one of the plaintiffs with a pistol. Eventually that struggle ended, and plaintiffs and Gent went to a back office in the store.

In a few minutes Lawton police officers Wertz and Dunegan arrived at the store and took plaintiffs into custody. When they arrived at the police station, another altercation occurred. Again, the parties dispute the precise events. Plaintiffs testified that Wertz hit Alvin in the face and pushed his head into a brick wall. Once inside the jail, plaintiffs were subjected to strip searches, allegedly because Wertz and Dunegan found marijuana paraphernalia in Solomon's possession. Plaintiffs were charged with various offenses: petty larceny (Vaughn, assault and battery (Alvin, Solomon, and Vaughn), assault on a police officer (Alvin), damaging private property (Alvin), resisting arrest (Vaughn and Solomon), disobeying a lawful order (Alvin), and possession of marijuana (Solomon). Seven months later the city dropped all charges and plaintiffs filed this suit. Meanwhile the T.G.&Y. managers checked with the cashier

from whom Vaughn bought the hairspray. Although there is a conflict, the evidence overwhelmingly suggests that the cashier believed Vaughn had paid her for the sunglasses and reported this to the T.G.&Y. managers shortly after the incident.

## II

The jury found all defendants liable for a violation of the Civil Rights Act of 1871, 42 U.S.C. §1983. The provisions of §1983 only apply to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation, custom, or usage. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Defendants contend on appeal that one or both of these elements is missing with respect to the Lusbys' claims. The §1983 liability of the various defendants rests on separate theories, so we consider each separately.

### A

Charles Gent contends that he was not acting under color of state law while employed at the T.G.&Y. store. Alternatively, he contends that if he was so acting he is not liable because he is entitled to a qualified immunity generally accorded to law enforcement officials.

At the time Gent allegedly committed the civil rights violations, he was an off-duty Lawton police officer employed as a part-time security guard at T.G.&Y.'s store in Lawton. Gent was not wearing a police uniform, although he apparently had his police badge with him as well as a Derringer pistol — not a police issue weapon — borrowed from a fellow officer.

We must consider the circumstances under which an off-duty police officer working as a security guard acts under color of state law for purposes of a civil rights claim.[1] In *Griffin v. Maryland*, 378 U.S. 130 (1964), the Supreme Court found state action when an amusement park security guard who had been deputized as a sheriff

of the county, wore a badge, and identified himself as a deputy sheriff, arrested black park patrons who refused to leave the park in response to his order. The Supreme Court there declared, "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Id* at 135.

The Supreme Court may now apply a somewhat more restrictive test. In discussing the interrelationship of the "state action" requirement of the Fourteenth Amendment and the "color of state law" requirement of 42 U.S.C. §1983 in another context, the Court described a two-part test for determining whether conduct allegedly depriving a plaintiff of a federal right is fairly attributable to the state: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) the depriving party must be "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982). The Supreme Court proceeded to describe how the concepts of state action and color of state law collapse into each other when the depriving party is one "whose official character is such as to lend the weight of the State to his decision," but are different when the constitutional claim is against a private party. *Id.* at 941. See also *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")

There is evidence in the record that both before and after the Lusbys' arrest, defendant Gent was acting as an on-duty police officer. When Gent accosted Vaughn Lusby, Gent flashed his badge and identified himself as a

Lawton police officer working as a security guard for T.G.&Y. According to Vaughn, Gent told Vaughn moments after he stopped him that he was going to jail. Gent denied this, but conceded that he placed Vaughn under arrest on the spot, before Gent had had any opportunity to question Vaughn or other witnesses or ascertain what had happened.[2] After the arrest Gent went to the police station to finish his paperwork on the Lusby incident. He used police documents to get information to complete the citizen's arrest forms. In addition there was evidence suggesting that Gent wanted to file charges against Alvin for assault on a police officer even though Gent was not acting as a police officer at the time he got into an altercation with Alvin and Solomon in the T.G.&Y. store.[3] *Griffin* and many other cases would appear to treat this as sufficient without more.[4]

If we view Gent as a private person who could be held liable only under the *Lugar* test, there is sufficient evidence of cooperation with the Lawton police department to conclude that he acted under color of state law. The testimony was that Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them and took them to jail without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word and before he completed a citizen's arrest form. The officers made no independent investigation of the shoplifting, which would have shown that Vaughn Lusby had paid for the glasses. The Lawton police chief testified that the police department routinely did not independently investigate a merchant's allegations of misdemeanor shoplifting before taking into custody suspects the merchant's employees detained through citizen's arrest. In fact, the police department provided T.G.&Y. with special forms prepared for merchants who detained suspected shoplifters which apparently allowed officers the discretion to issue a summons to a suspect when they arrived at the store, without taking

the person to jail. Thus, if we treat Gent as a private party, the local police followed a policy that allowed him to substitute his judgment for that of the police. Such cooperative activity between the police department and a private party is sufficient to make Gent a party acting under color of state law.[5]

Mindful of the Supreme Court's declaration in *Baker v. McCollan,* 443 U.S. 137, 142 (1979), that not every tort amounts to a deprivation of constitutional rights, we must determine whether a reasonable jury could have found Gent's conduct amounted to a violation actionable under §1983. Malicious prosecution does not automatically constitute a denial of due process. Nevertheless, if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke §1983. *Norton v. Liddel,* 620 F.2d 1375, 1378 (10th Cir. 1980); see also *Cline v. Brusett,* 661 F.2d 108, 112 (9th Cir. 1981). We believe that when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment. *Cf. MacDonald v. Musick,* 425 F.2d 373, 375 (9th Cir.), *cert. denied,* 400 U.S. 852 (1970) ("It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge."); *Dixon v. District of Columbia,* 394 F.2d 966, 969 (D.C. Cir. 1968) (condemning agreement in which prosecutor bargained not to press criminal charges if injured party would release police officers from all civil liability).

The plaintiffs presented evidence of several instances of Gent's actions that, viewed as a whole, represent a denial of due process. Gent initially participated in bringing the charges against all three plaintiffs. Gent signed the citizen's arrest forms as well as

most of the criminal complaints. Moreover, under Oklahoma law, Gent, as one of the injured parties, could have requested the court to drop those charges for which he received satisfaction. Okla. Stat. Ann. tit. 22, §1291-1294. Thus, Gent could have sought to have the charge of damaging private property dismissed after he received compensation for his broken eyeglasses, which, except for a few clay pots, was the only property destroyed in the T.G.&Y. scuffle. Instead, Gent and T.G.&Y. actively bargained with the Lusbys, seeking a release of civil liability before they would drop the charges. Such bargaining was outrageous in light of Gent's failure to question the T.G.&Y. cashier to see if Vaughn had paid for the sunglasses, and T.G.&Y.'s managers' knowledge moments after the incident that the cashier remembered selling a pair of sunglasses to a black man, whose face she never looked at, minutes before she sold hairspray to Vaughn Lusby. The latter evidence could have persuaded the jury that Gent and T.G.&Y. knew soon after the incident that the shoplifting charge against Vaughn was groundless, yet both Gent and T.G.&Y. kept this information from the prosecutor so that charges were left pending for over seven months. Therefore, we must uphold the jury's verdict in favor of Vaughn Lusby's §1983 claim against Gent.

Gent did not initiate the charges against Solomon and Alvin that arose after Wertz and Dunegan took them into custody, and it is not clear that he knew that those charges were groundless. Nevertheless, we conclude that the jury reasonably could have found Gent's conduct in connection with the other charges against Solomon and Alvin an unconstitutional violation of due process. His failure to seek to have the charges dismissed once he had overwhelming evidence that Vaughn had paid for the sunglasses could be regarded as an egregious case of malicious prosecution. In so holding, we note that Oklahoma law permits suspects reasonably to resist an unlawful arrest by a peace officer who attempts

to arrest the suspect for a misdemeanor not committed in the officer's presence. *Sandersfield v. State*, 568 P.2d 313, 315 (Okla. Crim. App. 1977) (per curiam); *Walters v. State*, 403 P.2d 267, 275 (Okla. Crim. App. 1965). Relatives of a suspect are privileged to come to the suspect's aid as long as the suspect himself is justified in using self-defense against excessive force by a police officer. *Carter v. State*, 507 P.2d 932, 933-34 (Okla. Crim. App. 1973). Therefore, the jury could have concluded that Solomon's and Alvin's attempts to free Vaughn from Gent's chokehold were privileged assaults and batteries. Consequently, for Gent and T.G.&Y. to use such charges as a bargaining chip in exchange for a release of civil liability also violated Solomon's and Alvin's constitutional rights.

Finally, Gent may not escape liability for his constitutional violations by invoking the qualified immunity accorded to state officials. He was not entitled to an instruction on qualified immunity because even if he qualified for such immunity once he slipped into his police role during the T.G.&Y. incident, he forfeited it by acting unreasonably when he investigated the alleged shoplifting. See *Allred v. Syarczkopf*, 573 F.2d 1146, 1153 (10th Cir. 1978). The law evaluates such conduct primarily by objective standards, determining whether a reasonable person would have known he was violating a constitutional or statutory right. *Harolow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case there is evidence that Gent did not check with the clerk operating the checkout line to see if Vaughn paid for the sunglasses. Moreover, Gent refused to let Vaughn get the cashier's attention at a time when her memory would still have been fresh.

**B**

The City of Lawton contends that the district court erred in refusing to direct a verdict for the city on plaintiffs' §1983 claims. A city is not liable under the doctrine

of respondeat superior in a §1983 suit. *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978). Lawton is liable under §1983 only if the police officers deprived plaintiffs of their constitutional rights pursuant to a policy or custom of the city. *See id.*

As noted above, the record contains evidence of an impermissible city policy that delegates a nondelegable duty and facilitates private abuse of criminal charges. The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchant designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants who detained suspected shoplifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.

That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. Therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a §1983 violation. As a result, we need not consider whether the city's policies for supervising and disciplining its police officers amounted to an unconstitutional procedure, or whether

allegations of police officer brutality sufficed to establish a pattern of such misconduct.

C

T.G.&Y. contends that the trial court erred in submitting to the jury plaintiffs' § 1983 claims against it because plaintiffs offered no evidence that T.G.&Y. acted under color of state law. T.G.&Y. is not liable for a civil rights violation simply because it employed Gent. We have held that a private entity that employs an off-duty police officer is not vicariously liable for its employee's deprivations of citizens' civil rights. *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 146 (10th Cir. 1974); see also *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982).

Nevertheless, T.G.&Y. and its managers acted under color of state law within the meaning of § 1983, because they were acting in concert with the Lawton police according to a customary plan for dealing with shoplifters that involved a constitutionally forbidden rule or procedure. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Because Lawton's official policy was to not independently investigate citizen allegations of misdemeanors prior to arresting suspects for such misdemeanors, T.G.&Y. had authority to bring its own criminal charges by initiating a citizen's complaint, knowing the city would not exercise any check on such charges. Thus, T.G.& Y. exercised a state inquisitorial right.

Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages. This is the form that T.G.&Y. sought to have the Lusbys sign in order to

have the charges dropped. Accordingly, the jury could reasonably have concluded that T.G.&Y. was liable under § 1983.

Officers Wertz and Dunegan assert that the judgments against them based upon § 1983 must be reversed. Wertz and Dunegan do not contest that they acted under color of state law; they do contest the jury's finding that they deprived plaintiffs of a constitutional right.

We have no problems with Alvin Lusby's claims against Wertz and Dunegan based on Wertz' conduct while transporting Alvin to jail. A police officer's use of excessive force is actionable under § 1983 as a constitutional violation. *Garrick v. City of Denver*, 652 F.2d 969, 972 (10th cir. 1981); see also *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). The plaintiffs presented ample evidence that Wertz struck Alvin on the face without cause while he was handcuffed outside the Lawton police station and then shoved Alvin head first into a wall on the way into the station. From this evidence the jury could have concluded that Wertz used excessive force against Alvin.

We find unpersuasive Dunegan's argument that he should not be liable for his failure to stop Wertz' assault upon Alvin. An officer who fails to perform a duty may be liable under § 1983 if that failure causes deprivation of protected rights. *McClelland v. Facteau*, 610 F.2d at 696. Thus, although Dunegan was not liable merely because he was present at the scene of a constitutional violation, *Russ v. Ratliff*, 538 F.2d 799, 805 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), he may be liable if he had the opportunity to intervene but failed to do so. *Hampton v. Hanrahan*, 600 F.2d 600, 626 (7th Cir. 1979) *rev'd in part on other grounds*, 446 U.S. 754 (1980) (per curiam); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972). Plaintiffs presented evidence suggesting that Dunegan could have prevented or stopped Officer Wertz' assault on Alvin Lusby. Thus, the trial court properly denied

Dunegan's motion for a directed verdict.

With respect to Vaughn's and Solomons' civil rights claims against Wertz and Dunegan, plaintiffs contend the officers conducted an unconstitutional strip search. Wertz and Dunegan, on the other hand, claim they conducted the strip search because they found a roach clip on Solomon and marijuana in the police car, allegedly placed there by one of the plaintiffs while being transported. They also claim to have received information that one of the Lusbys was carrying a large knife. A strip search is not improper when a suspect is going to be placed in the general jail population and has been charged with a drug offense such as possession of marijuana. See *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984). Although defendants presented no supporting evidence about the knife they thought a plaintiff might have or of the marijuana they claimed they found, we believe a reasonable jury could not find that the strip searches were unconstitutional and actionable under § 1983.

Plaintiffs also contend that Wertz' and Dunegan's arrest of plaintiffs at the T.G.&Y. store, based solely on Gent's accusations and without any independent police investigation to ascertain probable cause, supports the jury's finding of a civil rights violation. Police do not violate the Constitution when they arrest a person relying in good faith on a warrant that appears on its face to be valid but later provide deficient. *Baker v. McCollan*, 443 U.S. 137, 143-45 (1979). But they do violate the Constitution when they make a warrantless arrest without probable cause. See *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 144-45 (10th Cir. 1974); *Patzig v. O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977) (per curiam); *Sartin v. Commissioner of Public Safety*, 535 F.2d 430, 434 (8th Cir. 1976); *Street v. Surdyka*, 492 F.2d 368, 371-73 (4th Cir. 1974). We do not consider *Hudson v. Palmer*, 52 U.S.L.W. 5052 (U.S. July 3, 1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981), to

require a different holding. Those cases involved deprivation of property, for which state post-deprivation remedies were considered adequate. A false arrest involves a deprivation of liberty; no post-deprivation remedy in the form of damages can ever fully compensate for time wrongfully spent in custody. See *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring).

The trial court instructed the jury on the elements of probable cause and on Officer Wertz' and Dunegan's qualified immunity as police officers. There was sufficient evidence from which the jury could conclude that a reasonable police officer in Officer Wertz' and Dunnegan's position would have known he was violating the Lusbys' constitutional or statutory rights.[6] Therefore, the trial court acted properly with respect to the claims against Wertz and Dunegan, and we must affirm the jury's verdicts.

## III

The City of Lawton and its police officers, Wertz and Dunegan, contend that the trial court erred in failing to dismiss plaintiffs' pendent state law claims against them as barred by the Oklahoma Political Subdivision Tort Claims Act, Okla. Stat. Ann. tit. 51, §§151-170. Section 156(B) of that act provides,

> "A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with clerk of the governing body of the political subdivision within one hundred twenty (120) days after the loss occurs."

Plaintiffs did not give written notice of their claims to the city clerk before they filed this suit.

The Oklahoma courts have not required strict compliance with §156(B). Instead, as the Oklahoma Supreme Court has emphasized, "The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice." *Reirdon v. Wilburton Board of Education*, 611 P.2d 239, 241 (Okla.

1980) (footnote omitted). Thus, in *Duesterhaus v. City of Edmond*, 634 P.2d 720, 723 (Okla. 1981), the court held that the plaintiffs satisfied §156(B) by verbally notifying the city attorney of their claim against the city and negotiating with him concerning settlement. Although those plaintiffs did not strictly comply with §156(B), the court found that they substantially complied with that provision because they gave the city sufficient notice of their claim to fulfill the purposes of the statute: to give the city the opportunity to promptly investigate the claim, to repair any dangerous conditions, to quickly settle the claim if it was meritorious, and to prepare to meet any potential liability. *Id.*

Similarly, in this case, Lawton city employees Charles Gent and Eddie Hargraves tried to convince plaintiffs to enter into an agreement whereby plaintiffs would release the private party defendants from civil liability in exchange for dismissing the criminal charges against plaintiffs. As the trial court noted, "Obviously, the City had notice of possible civil claims which might be filed so that they could investigate the claims and determine their validity." Plaintiffs substantially complied with the notice provision within 120 days after they suffered their losses. Indeed, plaintiffs' malicious prosecution claim did not arise until after the prosecutor dismissed the charges against them. See *Coleman v. Strong*, 105 Okla. 282, 232 P.378, 379 (1925). Thus, as in *Duesterhaus*, plaintiffs' failure strictly to comply with the requirements of §156(B) did not undermine the purposes of the statute. Accordingly, we agree with the trial court that §156(B) does not bar plaintiffs' pendent claims.

## IV

Gent argues that the trial court erred in permitting plaintiffs to introduce into evidence portions of Gent's police department personnel profile. Gent's psychological profile states, "this man is somewhat suspect in the

direction of trying to 'appear good' . . . Because of the possibility that Mr. Gent might tend to 'fake good' it may be necessary to observe him rather closely to determine if the personality characteristics noted above are actually a part of him." Plaintiffs' Ex. 17. The City of Lawton Employee Performance Evaluation states that during Gent's initial years of employment he had to "muster his inner resources to gain control of his temper . . ." Plaintiffs' Ex. 36. Contending that this evidence tends to show that he had a bad temper, Gent argues that the evidence is relevant only to show he acted in conformity with his character when he apprehended the Lusbys, an impermissible purpose under Fed. R. Evid. 404(a). Alternatively, even if the evidence is otherwise relevant, Gent contends that its prejudicial impact substantially outweighed its probative value. Fed. R. Evid. 403.

The statement in Exhibit 17 is not prejudicial. Although the statement in Exhibit tends to show that Gent at one time had a bad temper, it also indicates that Gent controlled it. The record is replete with evidence of Gent's conduct on the day he apprehended the Lusbys. We therefore are convinced that the challenged evidence did not affect the jury's verdict, and that if the trial court erred in admitting the evidence, it was harmless error.

V

The jury found T.G.&Y. liable to Vaughn Lusby on the §1983 claim and on the pendent claims of false arrest and malicious prosecution. It awarded punitive damages of $50,000 to Vaughn against T.G.&Y.. T.G.&Y. argues that none of its conduct was sufficiently outrageous to warrant the jury's award of punitive damages.

Punitive damages are available in a §1983 action when a "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or

callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The standard for awards in §1983 actions is essentially the same as that for common law torts. *Id.* at 48-49, 51; see also *id.* at 48 n.13 (noting congruence between federal standard in §1983 actions and Oklahoma standard for punitive damages as described in *Smith v. Johnston*, 591 P.2d 1260, 1264 (Okla. 1978). In Oklahoma, a jury may award punitive damages for false arrest or malicious prosecution. *Moore v. Target Stores, Inc.*, 571 P.2d 1236, 1240-41 (Okla. Ct. App. 1977). The jury must find that the wrongdoer acted "willfully, wantonly or in reckless disregard of the rights of another, resulting in injury." *White v. Conoco, Inc.*, 701 F.2d 1442, 1448 (10th Cir. 1983).

There is ample evidence in the record from which the jury could have concluded that T.G.&Y. acted with reckless disregard or callous indifference to Vaughn Lusby's rights. T.G.&Y. kept the criminal charges against the Lusbys pending for over seven months even though it knew within minutes of apprehending Vaughn Lusby that he had paid for the sunglasses that he allegedly shoplifted. Malice is an element of the tort of malicious prosecution, for which the jury found T.G.&Y. liable. Similarly, the thrust of the Lusbys' civil rights claim was that T.G.&Y. abused its position of trust with the city by maliciously prosecuting the Lusbys upon citizen's complaints. Therefore, we must uphold the jury's award of punitive damages.

## VI

T.G.&Y. and Gent contend that the trial court erred in instructing the jury on future medical expenses and future loss of earnings, citing *Carraco Oil Co. v. Morhain*, 380 P.2d 957 (Okla. 1963). In *Carraco* the court held that there was no basis for the jury to assess future medical expenses for the cost of an operation when the plaintiff did not present any testimony that he would have to undergo the operation. *Id.* at 959. Nevertheless, the

court did not set aside the jury's verdict. Instead, it affirmed but reduced the verdict by an amount representing the maximum cost of the disputed operation. *Id.* at 961. The following year, the Oklahoma Supreme Court explained its holding in *M.K.&O. Airline Transit Co. v. Deckard,* 397 P.2d 888,889 (Okla. 1964), saying that *Carraco* "did not require to be shown the probable cost of further medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future medical needs." The court's concern was merely that the evidence in the case show with reasonable certainty the necessity for future expenditures. *Id.* The opinion in *M.K.&O. Airline Transit Co.* affirmed a jury verdict based on an instruction on future medical expenses when the plaintiff presented a doctor's report stating that the cause of his eye pain had not been determined and that the doctor advised observation and further studies. *Id.* Plaintiff's daughter, for whom he was also suing, was riding in the automobile when it crashed, and plaintiff presented evidence that she would probably need psychiatric treatment. *Id.* at 889.

The Lusbys did not present specific evidence suggesting they would require future medical treatment. They did present an expert, Moorman Prosser, M.D., who testified to some of the possible future physical and mental ailments that plaintiffs may suffer as a result of the T.G.&Y. incident. Dr. Prosser did not discuss even approximate damage amounts or specific courses of treatment. We cannot conclude with reasonable certainty that any of the Lusbys will require future medical care. Therefore, it was error for the judge to instruct the jury about such future medical expenses. Nevertheless, we conclude that it was harmless error that did not affect the jury's determination of damages. Dr. Prosser's testimony did not suggest any particular treatment that plaintiffs would have to undergo. As a result the jury did not hear any facts from which it could

have inferred that the Lusbys would incur future medical expenses. The size of the jury awards also indicate that it is unlikely they included any amount for future medical treatment.

We find no error in the court's giving the instruction on impairment of future earnings. Plaintiffs presented evidence that Vaughn's professional football career may have been impaired and that Solomon and Alvin may have suffered setbacks in seeking employment because of the stigma surrounding their arrest at T.G.&Y. It was up to the jury to weigh the credibility and significance of such evidence.

**VII**

All defendants argue that the trial court erred in awarding attorney's fees to plaintiffs in excess of the amount provided for in plaintiffs' contingent fee agreement with their attorneys. Our en banc decision in *Cooper v. Singer*, 719 F.2d 1496, 1503 (10th Cir. 1983), determined this issue. We there held that a fee award under U.S.C. §1988 is not limited by a contingent fee agreement between the client and his attorney. Therefore, the trial court did not err in awarding attorney's fees in excess of the amount that plaintiffs' attorneys would have received under the contingent fee agreement.

In view of our affirmance of the award against T.G.&Y. on the §1983 claims, we need not consider T.G.&Y.'s argument that those claims were so lacking in substance that the court could not assume pendent jurisdiction over the claims based upon state law. See *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1056-57 (10th Cir. 1979). We also need not consider whether a jury's general verdict for lump-sum damages may be upheld on appeal when the appellate court strikes down one of several bases for liability because we have upheld every basis of liability.

AFFIRMED.

## ENDNOTES TO APPENDIX A

[1] In the only case in this circuit involving an off-duty policeman, *Draeger v. Grand Central, Inc.*, 504 F.2d 142 (10th Cir. 1974), the court assumed, and the parties apparently did not contest, than an off-duty policeman working as a security guard in a department store was acting under color of state law.

[2] Gent's confusion of his private and public roles is evident from his testimony about what information he needed as a private citizen to arrest Vaughn for suspected shoplifting. Vaughn was utlimately charged with violating Lawton Code §15-104, "Larceny; embezzlement," a misdemeanor offense covering thefts of less than $20. Gent thought he could make a citizen's arrest for a misdemeanor offense not committed in his presence if he had spoken to a reliable witness. Yet actually, Gent's immediate arrest of Vaughn was legal only if Gent was acting as a police officer at the time, and then only if the offense was committed in his presence.

Under Oklahoma law a peace officer may not make a lawful arrest without a warrant for a misdemeanor offense, unless the offense was committed or attempted in his presence. *Catron v. City of Ponca City*, 340 P.2d 504, 507 (Okla. Crim. App. 1959); *see also* Okla. Stat. Ann. tit. 22, §§ 196, 202; *cf. Utzman v. State*, 568 P.2d 641, 642 (Okla. Crim. App. 1977) (describing shoplifting *in presence* of a peace officer). Presumably an ordinary citizen may not conduct such an arrest either. Oklahoma has modified the law slightly for shoplifting situations so that a peace officer may arrest any person if he has "probable cause for believing [the person] has committed larceny of merchandise held for sale in retail or wholesale establishments, when such arrest is made in a reasonable manner." Okla. Stat. Ann. tit. 22, § 1342. But this statutory exception only applies to peace officers. *Cf.* Okla. Stat. Ann. tit. 22, § 1343 (authorizing mere detention for a reasonable time by a merchant, his agent or employee). An off-duty police officer serving as a private security guard must comply with the requirements of a citizen's arrest. Stewart v. State, *527 P.2d 22, 24 (Okla. Crim. App. 1974).*

Gent admits that it was difficult for him to distinguish between his police officer duties and his citizen duties. This distinction may have been especially difficult because T.G.&Y. did not make any effort to train Gent about such subtleties prior to allowing him to work as a security officer.

[3] Gent originally signed the complaint against Alvin for assault on a police officer but his signature was later crossed out by Officer Wertz. The stated reason for insisting on handcuffing Alvin behind the back before leaving the T.G.&Y. was that his shoulder injury had not prevented him from hitting a police officer while at the store. Wertz testified in his deposition that he suggested to Gent that he change the assault on a police officer charge to simply assault because Gent was off-duty.

[4] See *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (action under color of state law when bank guard responded to problem as police officer by identifying himself as such and showing his police identification); *Davis v. Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (action under color of state law when Milwaukee statute provided that police officers were always subject to duty; officers in question identified themselves as police and showed their badges and guns during a brawl they started); *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976) (action under color of state law when regulation required off-duty police officer to take action "in any type of police or criminal activity" 24 hours a day); *Robinson v. Davis*, 447 F.2d 753, 758-59 (4th Cir. 1971) (no action under color of state law when plaintiffs knew that college security officials in police uniform were acting as private security guards), *cert. denied*, 405 U.S. 979 (1972); *Watkins v.Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir. 1950) (no state action when officer made no pretense that he was acting under state law).

[5] See *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th cir. 1980) (action under color of state law when private security guard acted in concert with police officers or pursuant to customary procedures agreed to by police departments); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977) (court upheld jury determination of action under color of law when store had a regular form it used to initiate criminal complaint against suspected shoplifters that was part of customary plan with police); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam) (action under color of law when police took shoplifting suspects into custody according to prearranged plan whereby police did not conduct an independent investigation of the criminal charges), *cert. denied*, 424 U.S. 915 (1976); *cf. White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

[6] In this case the jury found that Wertz and Dunegan had committed false arrests only against Solomon and Alvin; it found for Vaughn on the pendent false arrest claims only against Gent and T.G.&Y. The trial judge's instruction on the elements of the Oklahoma tort of false arrest parallels the elements of a § 1983 violation founded on events involving a false arrest: the police make a warrantless arrest without probable cause. In such circumstances it would seem the jury should have reached the same conclusion on both claims. Such inconsistency does not require reversal of the judgment, however, so long as there is sufficient evidence to support the jury's verdict on the claim on which they found liability. See *Malm v. United States Lines Co.*, 269 F. Supp. 731, 731-32 (S.D.N.Y.), *aff'd per curiam*, 378 F.2d 941 (2d Cir. 1967).

## APPENDIX B: OPINION BELOW

[Denial of Petition for Rehearing entered by United States Court of Appeals for Tenth Circuit on January 9, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY, Plaintiffs-Appellees, | ) | |
| v. | ) | Nos. 82-1721 82-1779 |
| T.G.&Y. STORES, INC., an Oklahoma corporation; CITY OF LAWTON OKLAHOMA, a municipal corporation; CHARLES GENT; STEVE WERTZ; and KENT DUNEGAN, Defendants-Appellants. | ) | |

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing en banc filed by appellants City of Lawton, Oklahoma, and T.G.&Y. Stores, Inc. in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

## APPENDIX C: OPINION BELOW

[Judgment based on jury verdict entered by United States District Court for the Western District of Oklahoma against Petitioners on December 15, 1981.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

| | | |
|---|---|---|
| SOLOMON LUSBY, et al., Plaintiffs, | ) | |
| vs. | ) | CIV-80-751-W |
| T.G.&Y. STORES, INC., et al., Defendants. | ) | |

**JUDGMENT**

The jury having found in favor of Plaintiffs and against Defendants in the following amounts, the Court finds that Plaintiffs shall recover of the defendant T.G.&Y. actual and punitive damages of $74,000 and of the defendant Charles Gent $6,000, together with reasonable attorneys' fees of $53,665, against the above named defendants pursuant to 42 U.S.C. §1988;

THE COURT FURTHER FINDS that upon the jury verdict herein Plaintiffs shall recover of the defendant City of Lawton, $20,000; the defendant Wertz, $5,000; and the defendant Dunegan $4,000, together with reasonable attorneys' fees of $21,335 against these three defendants pursuant to 42 U.S.C. §1988.

THE COURT FURTHER FINDS that Plaintiffs are entitled to recover of Defendants expenses of $5,431.49 together with costs to be taxed by the Clerk against the defendants.

IT IS SO ORDERED this 15th day of December, 1981.

/s/ Lee R. West
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-15-81

## CERTIFICATE OF SERVICE

I, Michael W. Hinkle, a member of the Bar of the Supreme Court of the United States and counsel of record for T.G.&Y. Stores, Inc., Petitioner herein, hereby certify that on May 8, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Jack L. Kinzie and Gretchen A. Harris, and to Linda G. Scoggins, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

On the City of Lawton, Oklahoma, a separate Petitioner herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Russell D. Bennett, the above named Petitioner's counsel of record, at 103 S.W. 4th Street, Lawton, Oklahoma, 73501.

All parties required to be served have been served.

Dated May 8, 1985.

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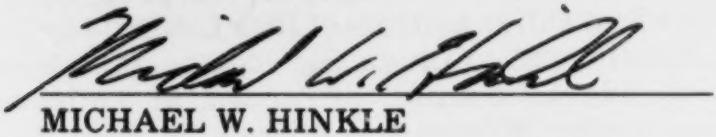

MICHAEL W. HINKLE

## III. T.G.&Y.'S ATTEMPT TO REARGUE EVIDENCE PRESENTED BELOW DOES NOT MERIT REVIEW BY THIS COURT.

### A. T.G.&Y. Does Not Challenge The Submission Of Or Its Demonstrated Liability Founded On Pendent Claims, Thus Providing An Independent Basis For The Jury Verdict Which Precludes Review.

Because the jury specifically found, and T.G.&Y. does not challenge, its liability on various pendent state claims, including false arrest, as to all the Lusby brothers, should this Court question whether the §1983 liability was appropriate the result would still be the same. T.G.&Y. is liable to the Lusby brothers for damages as determined by the jury. Clearly, the petition for a writ of certiorari must be denied.

### B. T.G.&Y.'s Issue Is Wholly Factual And Presents No Novel Question Or Conflict Of Law.

T.G.&Y. does not challenge the trial and appellate courts' findings that its employee, Gent, acted under color of law. Moreover, according to T.G.&.Y.'s *own* statement at page seven of its petition for a writ of certiorari, the only issue raised is whether, *under these facts*, T.G.&Y. can be said to have acted under color of law. Because the determination of this question depends on the unique facts attendant to the false arrest, incarceration and continued prosecution of the Lusby brothers and raises no question of law which would impact on future litigants, this case does not merit review by this Court.

T.G.&Y. attempts to present this case in the posture of findings of the appellate court, ignoring the fact that the appellate court's recitation of the evidence on which T.G.&Y.'s liability was predicated wa- based on substantial and competent evidence pre-

sented at the trial court level. The question whether T.G.&Y. acted under "color of law" was fully and completely considered at the trial court level; the facts adduced before the trial court support the determination that T.G.&Y. acted under "color of law."

T.G.&Y. merely argues there was no evidence supporting its willful participation in concerted activity. However, evidence to the contrary was demonstrated at trial. T.G.&Y. relied solely on the Lawton police force for training of its security guards. At trial T.G.&Y. explicitly admitted it had determined to hire *only* Lawton police officers as security guards. (Tr. 890). Testimony indicated that T.G.&Y. allowed one such Lawton police officer/security guard to virtually hire the other security guards. (Tr. 737). T.G.&Y.'s manager's own testimony indicated that no background check was performed. (Tr. 845, 846). According to T.G.&Y.'s own testimony it has maintained a policy whereby, during the arrests of shoplifters, members of the Lawton Police Department filled out citizen's arrest forms which should have been filled out by T.G.&Y. (Tr. 858, 859). No investigation of shoplifting was done by Lawton police officers at the time they were called to the store (Tr. 857, 858), nor was there even a requirement of T.G.&Y. by Lawton that all the proper forms be filled out at the time of arrest. T.G.&Y. successfully created a scenario in which it had authority to bring its own criminal charges by initiating a citizen's complaint because T.G.&Y. knew Lawton would not exercise any check on such charges. In this instance it was the very fact of Gent's status as a Lawton police officer and T.G.&Y.'s use of that status that created the scenario in which the Lusby brothers were officially incarcerated, physically abused and then maliciously prosecuted for more than seven months.

These facts, in addition to those articulated by the appellate court, support the trial court's finding and

the jury verdict. The authority cited by the appellate court clearly creates no conflict with the facts here, nor has T.G.&Y. raised any conflict with other established cases. Furthermore, the appellate court recognized, at n.5 of its opinion (App. A, p. 23a, T.G.&Y. petition), the apposite authority persuasive to its decision. *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Duriso v. K-Mart*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976); *Cf., White v. Scrivner Corp.*, 594 F.2d 140, 143-44 (5th Cir. 1979) (no color of law because police department had policy of independently investigating before making arrests for shoplifting).

Moreover, T.G.&Y.'s argument that its demand of a release of civil liability is a basis for a finding that it acted under color of law is erroneous. The Tenth Circuit found that T.G.&Y.'s demand of a release was one of the acts which caused the violation — not the act that created the "color of law" requirement. As the court stated:

> Acting under color of state law, T.G.&Y. violated the plaintiffs' constitutional rights when it used the threat of criminal charges as a bargaining chip for a release of civil liability. The evidence suggested that T.G.&Y.'s policy was always to seek a release of liability as a condition for dropping criminal charges. T.G.&Y. even had a special form made up that required suspects to confess their guilt and release T.G.&Y., its officers and employees from all claims for damages.

App. A, p.13a, T.G.&Y. petition.

Additionally, T.G.&Y.'s apparent belief that the appellate court held that T.G.&Y. acted under color of law when it failed to dismiss charges against the Lusby brothers under an Oklahoma state statute which provides that a complaining party may, after satisfac-

tion, cause criminal charges to be dismissed is a misreading of the court's opinion. The abuse of the statute was not a basis for the "color of law" requirement; it was a basis for liability. Here T.G.&Y. has not contested its liability for the false arrest — only that it acted under color of law. Its insubstantial arguments challenging the finding of liability do not warrant review.

## CONCLUSION

Because petitioners present only questions of fact bereft of any federal or constitutional questions of great import, and because the decision below is consistent with apposite rulings of this Court and circuit courts, the petitions for writs of certiorari must be denied.

Respectfully submitted,

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June, 1985

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No. 84-1715
No. 84-1759

FILED
JUN 22 1985
ALEXANDER L. STEVAS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
*Petitioners,*

v.

SOLOMON LUSBY, et al.,
*Respondents.*

T.G.&Y. STORES, INC.,
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v.

SOLOMON LUSBY, et al.,
*Respondents.*

## RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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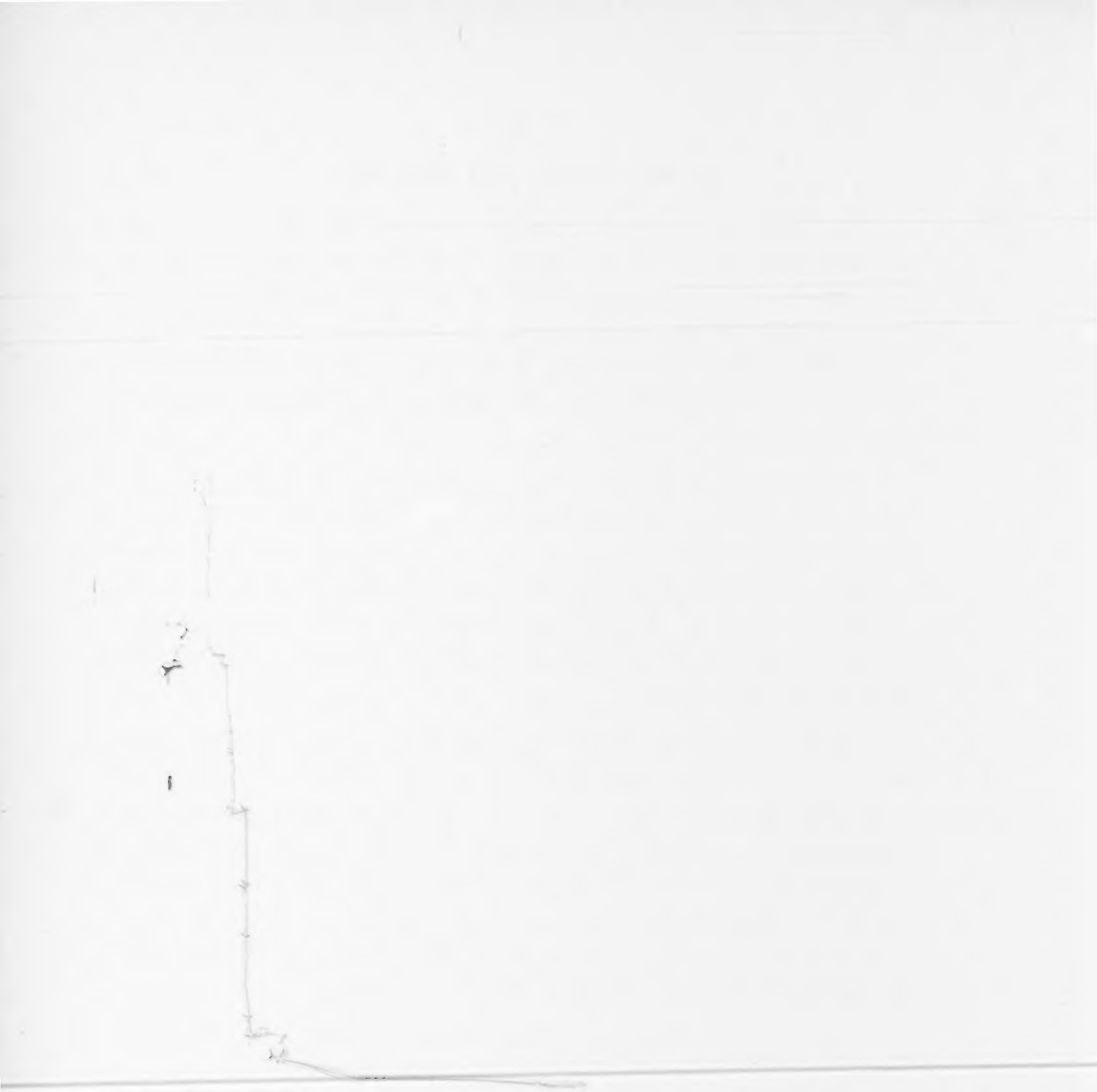
BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether substantial evidence of various conscious, articulated municipal policies, including a policy of non-investigation of shoplifting complaints prior to arrest, supported the jury verdict that the City of Lawton was liable for the false arrest, incarceration and continued seven month prosecution of innocent private citizens?

2. Whether substantial evidence of compliance with the notice provisions of the Oklahoma Political Subdivision Tort Claims Act permitted the submission to the jury of pendent state claims of false arrest, assault and battery, and malicious prosecution against the City of Lawton and Officers Steven Wertz and Kent Dunegan?

3. Whether the introduction of substantial evidence of T.G.&Y. Stores, Inc.'s concerted action with the City of Lawton and its own independent action in bringing about the false arrest, incarceration and continued seven month prosecution of innocent private citizens supported the jury verdict which was expressly premised on articulated findings of violations of both federal and state law?



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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

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CITY OF LAWTON, OKLAHOMA, et al.,
*Petitioners,*

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---

T.G.&Y. STORES, INC.,
*Petitioner,*

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SOLOMON LUSBY, ET AL.,
*Respondents.*

---

# RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

## COUNTERSTATEMENT OF THE CASE

Because both petitioners' statements fail to completely articulate the evidentiary bases on which the jury verdict and appellate review were premised, respondents provide this statement of the case.[1]

---

[1] References to the Record on Appeal will be identified by (ROA _____). References to the trial transcript will be identified by (Tr. _____).

On July 6, 1979, Vaughn, Solomon and Alvin Lusby (collectively "the Lusby brothers") were enroute to Oklahoma City from Lawton, Oklahoma, when they stopped at a T.G.&Y. Stores, Inc. store ("T.G.&Y.") located on Sheridan Road in Lawton to purchase a pair of sunglasses for Vaughn. Once inside the store, Vaughn selected a pair of sunglasses, went through the checkout stand with his brother Alvin, paid the cashier for the sunglasses and proceeded to wear the sunglasses. Immediately after going through the checkout area Vaughn decided to purchase some hair spray before leaving the store. He circled back around the checkout area, selected the hair spray and, carrying the sunglasses, went back to the same cashier and paid for the hair spray. He then proceeded out the door of the store. (Tr. 18-21). David Jamison, an assistant manager at the store, saw Vaughn pass through the checkout line the second time, carrying the sunglasses but not paying for them. Jamison summoned Charles Gent ("Gent"), an off-duty City of Lawton police officer employed by T.G.&Y. as a plainclothes security guard, to investigate.

Gent stopped Vaughn outside the store and asked him if he had a receipt for the sunglasses. Vaughn explained that he had paid for the sunglasses but that he did not have a receipt. Gent showed Vaughn his Lawton Police Department badge, told him he was a Lawton police officer working as a security guard and that Vaughn was under arrest for shoplifting. (Tr. 23-25). Vaughn immediately suggested they go back inside the store to clear up the matter. (Tr. 22-25). It was Vaughn's desire and intention to have Gent speak with the cashier so that she would have an opportunity to vouch for the fact that he had indeed paid for the sunglasses while it was fresh in her mind. However, once inside the store, Gent refused to ask the cashier if Vaughn had paid for the sunglasses and insisted that Vaughn go directly to a back room of the store. (Tr. 26-29). When Vaughn hesitated and raised his voice in

an attempt to get the attention of the cashier, Gent grabbed him around the throat using a chokehold. Then two other employees of T.G.&Y. each grabbed one of Vaughn's arms and assisted Gent in pinning Vaughn.

As Vaughn and Gent were going back into T.G.&Y. from the parking lot, Alvin Lusby was informed by Gent that he had arrested Vaughn for shoplifting. Alvin knew one of the managers of the store and immediately proceeded to another area of the store to seek his assistance in clearing his brother. In the meantime, Solomon Lusby came back in the store to see what was taking his brothers so long. He was totally unaware of the events which had taken place between Vaughn and Gent. (Tr. 196, 197, 361).

As Solomon entered the store one of the first things he saw was his brother Vaughn with three strange men holding him down. One of the men, whom he later learned to be Gent, had his brother around the neck in a chokehold and the other two men had hold of his arms. Solomon immediately went to his brother's aid. He struck Gent to get him off his brother and they struggled for a few seconds until two men, T.G.&Y. employees, grabbed Solomon to restrain him. As the men gained control of Solomon, Gent pulled a small pistol from his waist. (Tr. 34, 199-201).

About the time Gent pulled the pistol out and started waving it around, Alvin appeared back on the scene. There was undisputed testimony that as Gent was waving the gun around he struck at least one of the brothers in the head with the gun as he was being held by T.G.&Y. employees.

It was at the point that the pistol was being wildly waved about that it became quite obvious to Vaughn that matters were getting out of hand. Vaughn had not tried to intervene while his brothers were being hit by Gent or held by the T.G.&Y. employees. He continued to try to get the situation under control. Vaughn

calmed the crowd and told his brothers and Gent to cool down, go in the back and talk about it. Vaughn was afraid the gun might accidently go off and injure someone. (Tr. 37, 630, 871, 872).

The Lusby brothers, Gent and perhaps another T.G.&Y. employee then proceeded to a back room in the store. In a few minutes two Lawton police officers, Steve Wertz and Kent Dunegan, arrived at the store and took the Lusby brothers into custody. (Tr. 44). Pursuant to the official, stated Lawton Police Department policy (Tr. 1219), no questions were asked and there was no independent investigation by the police officers. Officers Wertz and Dunegan picked up the Lusbys, handcuffed and frisked them, and took them to jail and put them in cells without interviewing witnesses or conducting any inquiry to determine whether probable cause existed to arrest them. They relied entirely on Gent's word to affect the arrest before he had even completed the citizen's arrest form. (Tr. 44-47, 638, 1484-87).

After the officers put the Lusby brothers in the patrol car, Alvin was able to move his handcuffs from behind his back to in front in order to relieve the pain in his shoulder. Alvin Lusby had requested that his handcuffs be placed in front because of an injured shoulder but his request was refused. (Tr. 46, 47). The fact that he had moved his handcuffs without approval of one of the officers obviously angered Officer Wertz when they arrived at the Lawton police station and he realized what had happened. (Tr. 53). There was evidence that Wertz intentionally and maliciously hit Alvin in the face with his fist and pushed him head first into a brick wall on the way into the jail area. (Tr. 53, 54, 219, 382). The testimony was reinforced by other evidence of Wertz' violent propensities as a police officer. (TR. 1101-1104, 1135-1192, 1200-1201). There was no evidence that Officer Dunegan took any action to stop the actions of Wertz.

Once in the jail area, the Lusby brothers were all subjected to strip searches. At the trial Wertz and Dunegan testified that the Lusby brothers were all strip searched because they found a roach clip among Solomon's personal possessions. (Tr. 1497, 1546). That testimony was contrary to their sworn answers to interrogatories which stated that the strip search was made because the officers had been told by someone from the T.G.&Y. store that one of the brothers had a large knife. (ROA 1498-99, Pl. Exh. 5). For whatever reason, all three Lusby brothers were strip searched. The justification for the strip searches was really unimportant as far as the Lawton Police Department was concerned because the Department had no policy concerning when a strip search was proper. That judgment was left totally to the discretion of the officer. (Tr. 1217, 1218).

The Lusby brothers were finally booked and charges filed against them for assault and battery, resisting arrest, disobeying a lawful order, shoplifting, possession of marijuana, and assault and battery on a police officer (Pl. Exh. 8, 9, 10) after Gent appeared at the station to fill out his arrest forms. (Tr. 637, 638). The brothers were released on bail after several hours in jail. Alvin immediately went to an emergency room to receive medical attention for his injuries. (Tr. 71, 390).

Seven months later. on February 27, 1980, the City of Lawton ("Lawton") dropped all charges against the Lusbys. (Tr. 657). For seven months Lawton never investigated the incidents charged against the Lusby brothers or, if it did, it left the charges pending despite overwhelming evidence that no shoplifting occurred. Further, there was overwhelming evidence that moments after the incident Gent and T.G.&Y. management knew that the cashier believed Vaughn had paid her for the sunglasses. However, during that seven month period, instead of dropping the charges Gent and T.G.&Y. bargained for a release of liability.

Lawton, through its city prosecuting attorney, also demanded from the Lusby brothers a release of civil liability before it would drop the charges. (Tr. 1361). This demand was articulated official policy; it was required of Larry Mallory, another arrestee beaten by Wertz, prior to the dropping by Lawton of charges filed against him. (Tr. 1189-90).

This case was filed on June 23, 1980. The trial began on September 16, 1981. The jury verdict in favor of the Lusby brothers was rendered on October 1, 1981. The Court of Appeals for the Tenth Circuit affirmed on November 23, 1984. On January 9, 1985, it denied rehearing and suggestions for rehearing en banc as no judge requested a poll for rehearing en banc.

## REASONS FOR DENYING THE WRIT

### I. LAWTON'S PETITION RAISES ONLY EVIDENTIARY ISSUES WHICH DO NOT WARRANT THIS COURT'S REVIEW.

#### A. The Question Of Liability Of Lawton Based On An Alleged Single Incident Was Not Presented To Nor A Basis For The Decision Of The Appellate Court And Is Not Properly Before This Court.

Lawton, in its petition, has for the first time attempted to characterize the factual scenario as a "single incident" and has framed its question presented in terms of whether this alleged single incident may be a predicate for municipal liability. However, the question whether the false arrests, incarceration and continued seven month prosecution could even be considered a "single incident" was not presented by Lawton to the appellate court nor was it a basis for the decision. Thus, the question is not properly preserved for review by this Court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970); *Cf., City of*

*Oklahoma City v. Tuttle*, 53 U.S.L.W. 4639 (U.S. June 3, 1985) (single incident would be reviewed where presented to and directly decided by appellate court).

Moreover, Lawton's brief to the appellate court demonstrates that it never considered its liability to be predicated on a single incident. To the contrary, Lawton merely claimed on appeal the evidentiary insufficiency of numerous instances of police officer misconduct as one of the basis for its liability[2]. This evidence identified by Lawton was admittedly admissible as relevant to the question whether Lawton could be held liable for the actions of Officer Wertz in his assault and battery on Alvin Lusby. Lawton, on

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[2] Lawton framed its challenge on appeal as:

> THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT FOR THE CITY OF LAWTON. SINCE THERE EXISTS NO COMPETENT EVIDENCE SHOWING THE EXISTENCE OF AN OFFICIAL POLICY OR CUSTOM OF THE CITY WHICH CAUSE THE INJURIES ALLEGED UNDER 42 U.S.C. §1983.

"Brief for Appellants," City of Lawton at 20;

and further identified the numerous incidents it felt were insufficient:

> Turning to this appeal, the plaintiffs introduced seven instances of actions by police officers to establish policy or custom under §1983. They were:
>
> 1) Byron Lusby's testimony concerning an assault upon a juvenile at Marie Detty Tr. at page 986-988, lines 16-13;
>
> 2) Alford Hennessee's testimony of violence toward him at Tr. pages 1114-1120, lines 10-4;
>
> 3) Bill Hensley's testimony concerning an assault upon a prisoner at Tr. page 1102, line 17;
>
> 4) The Black cartoon incident Tr. at page 1213, line 12;
>
> 5) The deposition of Larry Mallory and Tony Tyson at Tr. pages 1135-1192;

appeal, implicitly recognized that its liability to all the Lusby brothers for the arrests and continued prosecution did not arise from a single incident but from a myriad of official policies and top-level official actions. Its inarticulate attempt to now assert the "single incident" question is wholly improper.

B. Lawton's Liability Was Not Predicated On A Single Incident; Its Mere Claim Of Evidentiary Insufficiency Does Not Warrant This Court's Review.

Lawton, in its petition, wholly fails to recognize that the predicate for its liability was not inferences to be drawn from a single incident, but substantial evidence of various conscious, articulated policies which, when carried out by Lawton officials, constituted a direct affirmative link to the constitutional deprivations suffered by the Lusby brothers. As the appellate court stated:

> The Lawton police department did not routinely investigate merchants' allegations of shoplifting before arresting suspects that the merchants designated. The Lawton police chief testified that his department had a policy of not conducting any independent investigation before taking a person into custody who has been made the subject of a citizen's arrest. In addition, the Lawton Police Department provided T.G.&Y. with special forms that the police prepared for merchants who detained suspected shop-

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[2] (Continued)

6) Eddie John Hargraves' testimony concerning Steve Wertz at Tr. page 769, lines 5-9; and

7) Robert Gillian's testimony concerning Sgt. Reynolds Tr. at page 1205, line 24.

"Brief for Appellants," City of Lawton at 27.

lifters. These forms apparently allowed city police officers discretion to issue a summons to suspects when they arrived at the store, without taking the suspects to jail.

That Officers Wertz and Dunegan adhered to this policy of no independent investigation is apparent from their testimony. They picked up the Lusbys, handcuffed and frisked them, and immediately took them to jail. They did not interview any witnesses or conduct any inquiry to determine whether probable cause existed to arrest. At the time Wertz and Dunegan took the Lusbys into custody Gent had not completed the citizen's arrest form. There is evidence that the city never investigated the incidents charged against plaintiffs, or if it did, that it left the charges pending despite overwhelming evidence that no shoplifting occurred. Therefore, the trial judge properly submitted to the jury the question of the City of Lawton's liability for a §1983 violation.

Lawton's App. B, pp. 31-32a of the Petition For A Writ Of Certiorari.

Moreover, uncontroverted evidence at trial established that Lawton, through its city prosecuting attorney, continued to demand for seven months a release of liability from the Lusby brothers as a condition for dropping the charges. This demand was standard operating policy for Lawton. These articulated official policies and their use against the Lusby brothers served as sufficient evidentiary predicate on which the jury could reasonably have found Lawton liable under 42 U.S.C. §1983. This evidentiary predicate does not conflict with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and related cases, but is wholly congruent with them.

C. The Decision Of The Court Of Appeals Does Not Conflict With Decisions From Other Circuits.

Lawton attempts to argue that the appellate court's decision conflicts with other circuit court decisions disapproving municipal liability on the basis of a single, isolated incident. Because, as demonstrated in the appellate court's decision and in Part I.B., *supra*, the basis of Lawton's liability is not any inference which must be drawn from an isolated incident involving only a non-supervisory police officer but rather many conscious policies articulated and carried out by municipal decision-makers, including both the police chief and the city prosecuting attorney, those cases cited by Lawton are distinguishable on their facts and do not conflict with the decision of the appellate court sought to be reviewed here.

Moreover, a review of this Court's recent decision in *City of Oklahoma City v. Tuttle, supra*, demonstrates no conflict with the requirements for municipal liability articulated in that case. The various conscious, articulated municipal policies undeniably satisfy the mandate of the plurality that " 'policy' generally implies a course of action consciously chosen from among various alternatives." *Id.* at 4643. Because the evidence demonstrated that Lawton made the "conscious choice" to never (even after charges had been filed) make any independent investigation of the shoplifting arrests and to demand release of liability before the admittedly groundless charges were dismissed, the issue of municipal liability was properly submitted to the jury.

Furthermore, because the police chief and city prosecuting attorney who articulated and carried out the municipal policies which were affirmatively linked to the deprivations are, under the reasoning of *City of Oklahoma City v. Tuttle, supra*, "municipal decision-makers," *Id.* at 4642, the evidence adduced be-

low was clearly sufficient to support the jury verdict of municipal liability.

Finally, Lawton's reliance upon certain language of the appellate court in *Cowdrey v. City of Eastborough*, 730 F.2d 1376 (10th Cir. 1984), to demonstrate a conflict is unwarranted. The court, sitting en banc, reviewed and correctly articulated principles governing municipal liability, stating that an isolated incident "without more" cannot serve as a basis for liability. In this case, because there was demonstrated substantial evidence of more than an isolated incident, there exists no conflict with *Cowdrey v. City of Eastborough, supra*; rather, its reasoning supports the appellate court's decision here.

D. The Trial Court's Instruction Concerning Lawton's Liability Is Not Properly Before This Court Nor Worthy Of This Court's Review.

Lawton did not object to any instruction given by the trial court as required by Rule 51 of the Federal Rules of Civil Procedure. To the contrary, Lawton announced, "We have no objection to any of the instructions, your Honor." (Tr. 1635). Now Lawton, by including an instruction it claims is infirm and "begging this Court to read it," in its petition attempts to raise a belated objection to the instruction. This attempt must fail.

1. Rule 51 Requires That Lawton Have Made An Objection At Trial; Its Failure To Do So Precludes Review Here.

As this Court reaffirmed in *City of Oklahoma City v. Tuttle, supra*, Rule 51 requires that an objection to an instruction be made *at trial*. Failure to do so must waive the objection. Moreover, because Lawton failed to raise any error in the instruction before the appellate court, the instruction is not properly before this Court for review. To the contrary, Lawton argued on

appeal not that there was any infirmity with the instruction or that its liability even turned on a single incident, but that demonstrated multiple incidents of violence could not serve as an evidentiary predicate for Lawton's liability.

2. The Decision Below Was Correct, Notwithstanding The Giving Of An Instruction Which Referred To "Single Incident" Liability.

The infirmity identified by this Court in the instruction in *City of Oklahoma City v. Tuttle, supra*, an instruction admittedly very similar to the one given in this instance, is not present here. The jury returned a special verdict in which it independently found Lawton liable to two of the Lusby brothers on pendent state claims properly submitted[3] to it which did not require exclusive reliance on an arguably impermissible instruction. Thus, because there exists an independent, clearly discernible basis for the jury's verdict, reversal is not appropriate. The general verdict, fatal in *Tuttle*, was not used here.

As this Court stated in *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. 2733 (1983), when there is evidence in the record that the verdict did not rest exclusively on an impermissible portion of an instruction, the giving of the instruction need not mandate reversal. *Id.* at 2745. When there is no uncertainty that an independent basis existed, affirmance is permitted. *Id.* Here, where the verdict obtained from sufficient pendent state claims, review is not necessary; the result is clearly correct. Moreover, because in this case the arguably infirm instruction did not relate to constitutionally protected activity by petitioners as was present in *Stromberg v. California*, 283 U.S. 359 (1931), reversal is not required. *Zant v. Stephens*, _____ U.S. _____, 103 S.Ct. at 2746.

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[3] See Part II, *infra*.

Furthermore, in *Tuttle*, respondent's exclusive theory of recovery, lack of training, might have allowed liability to have been found solely on the basis of an inference drawn from a single incident. Here, because the jury was not required to "infer" the existence of any policy, much less a lack of training, as the predicate for liability, the infirmity does not exist. To the contrary, the articulated, conscious decisions made by municipal policymakers served as the permissible predicate on which the jury could find liability.

### E. Lawton's Claim Of Prejudice Accruing From The Appellate Court's Articulation Of The Municipal Policy Which Created The Affirmative Link Between Lawton And The Constitutional Violation Is Not Supported By The Facts Nor The Law And Merits No Review.

Lawton asserts that the muncipal policy of non-investigation and delegation of a non-delegable duty articulated by the appellate court as the basis for its liability was not considered or litigated at trial. To the contrary, as set forth in the trial transcript, this policy and other questionable municipal policies were presented to the jury. That evidence could thus be a basis for affirmance, on appeal, of the jury verdict. "Jury findings on disputed matters of fact will be upheld by the reviewing court if substantial evidence exists to support them." *Control Components, Inc. v. Valtek, Inc.*, 609 F.2d 763 (5th Cir.), *cert. denied*, 449 U.S. 1022 (1980), citing *Kiva Corporation v. Baker Oil Tools, Inc.*, 412 F.2d 546 (5th Cir. 1969); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Moreover, as set forth in Part I.A., *supra*, Lawton chose, in its brief on appeal, to challenge only the sufficiency of certain evidence in attempting to argue insufficiency of a series of prior and subsequent inci-

dents of violence and misconduct by Lawton police officers. Lawton's own limitation of the issue on appeal cannot limit the appellate court's review of the record or articulation of other competent evidence as the basis for Lawton's liability.

Lawton cannot seriously contend that no evidence of the articulated municipal policy was presented at trial; it rather seems to assert that, given a second opportunity at trial, it might prove to the jury that its policies were permissible. This plea for a second chance at challenging the Lusby brothers' competent evidence cannot be a basis for the granting of the requested writ.

Finally, Lawton's reliance on two cases, *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979), and *Armstrong Cork Co. v. Lyons*, 366 F.2d 206 (8th Cir. 1966), is misplaced. While those cases do contain language relevant to a claim of prejudice resulting from a shifting of the issues, the act of shifting of the issues which occasioned the claim of prejudice occurred at trial. Unlike those fact situations, Lawton is not faced with a shifting of the issues at trial or an amendment of the complaint by an opposing party but with appellate affirmance of a jury verdict based on its articulation of competent evidence submitted at trial but ignored by Lawton on appeal.

## II. THE FACT QUESTION WHETHER THE LUSBY BROTHERS COMPLIED WITH STATE LAW REQUIREMENTS WAS PROPERLY DECIDED BELOW.

### A. Lawton's Issue Is Purely Factual And Raises No Novel Or Controversial Federal Or Constitutional Question.

Lawton argues that the facts of this case do not present sufficient evidence that the Lusby brothers complied with the notice requirement of the Oklahoma Political Subdivision Tort Claims Act,

Okla.Stat. tit. 51, §151-170 (1981) (the "Tort Claims Act"). This argument does not merit review by this Court because it concerns admitted fact questions relating to compliance with state laws which implicate no constitutional or federal questions.

### B. The Court Of Appeals Correctly Decided That, Under These Facts, The Lusby Brothers Had Substantially Complied With The Notice Requirement Of The Tort Claims Act.

In determining whether the Lusby brothers complied with the notice requirement of the Tort Claims Act, the question of fact is whether the Lusby brothers' actions constituted notice to Lawton. Review of the facts on which the appellate court premised its determination that the trial court was correct in its finding that the Lusby brothers had complied with the notice provision in light of the appropriate judicial interpretation demonstrates that the Lusby brothers "substantially complied" with the notice requirement. Moreover, because according to Oklahoma's interpretation of state law Lawton suffered no prejudice, the Tort Claims Act cannot be any bar to the pendent claims. *Duesterhaus v. City of Edmond*, 634 P.2d 720, 722 (Okla. 1981); *Reirdon v. Wilburton Board of Education*, 611 P.2d 239, 241 (Okla. 1980).

In evaluating this question, reasoning of the Supreme Court of the State of Oklahoma as to the Tort Claims Act must be noted:

> The object of the statute must be kept in mind, and it should not be given a construction which will defeat the ends of justice.

*Reirdon v. Wilburton Board of Education*, 611 P.2d at 241.

Such a construction comports with the purpose of the Tort Claims Act: to provide justice for the plaintiff

while preventing prejudice to the defendant. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Here, until the date of dismissal of the charges, Lawton, because of its demand through its city prosecuting attorney that the Lusby brothers release all claims, was obviously aware of the monetary claim which became the substance of the lawsuit; within 120 days of that dismissal date the claims had not grown stale; prompt investigation and the preparation of a competent defense was possible; settlement discussions, had Lawton wished to undertake them, could easily have been initiated. There simply was no prejudice which accrued to Lawton as would permit a statutory bar here. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The Lusby brothers have, according to the controlling authority of the Supreme Court of the State of Oklahoma, complied with the Tort Claims Act because there has been no prejudice to Lawton.

Moreover, not only is it clear that no prejudice resulted, but the Lusby brothers also have unquestionably substantially complied with the method of notice set forth in the statute as interpreted by the Supreme Court of the State of Oklahoma in *Duesterhaus v. City of Edmond, supra*, and *Reirdon v. Wilburton Board of Education, supra*.

The Lusby brothers provided verbal notification to the Lawton city prosecuting attorney that monetary relief was demanded in the negotiations concerning and ultimate refusal of the city prosecuting attorney's continued demand, not merely the demand of two police officers, to release their claims prior to the February 27, 1980, dismissal of the charges. Such verbal notice to the city prosecuting attorney and negotiation has *explicitly* been held to be substantial compliance by the Supreme Court of the State of Oklahoma. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. Written notice is simply not a requirement mandated by the Oklahoma Supreme Court.

Furthermore, the Lusby brothers' choice of verbal notice and their filing of a federal lawsuit cannot be said, considering the liberal construction given by the Oklahoma Supreme Court, to be less than substantial compliance with any written notice requirement which might survive *Duesterhaus v. City of Edmond, supra.* Again, the key factor here, as demonstrated by Oklahoma Supreme Court authority, is the lack of prejudice accruing to Lawton. *Duesterhaus v. City of Edmond*, 634 P.2d at 722. The mandate of the Oklahoma Supreme Court has been met; there was substantial compliance with the notice requirement of the Tort Claims Act; there was no prejudice to Lawton.

Finally, Lawton's belated suggestion that this question be certified to the Oklahoma Supreme Court is inappropriate. The question is not a question of law which under the Oklahoma Statute[4] may be certified, but a question of fact which, because of abundant Oklahoma authority considered and cited by the trial and appellate courts in their review of the facts, need not be certified. *See Lehman Brothers v. Schein*, 416 U.S. 386, 388-89 (1974) (Rehnquist, J., concurring). Moreover, because the notice question would not aid the resolution of any constitutional claim, certification is not appropriate here. *Cf., Zant v. Stephens*, 456 U.S. 410, 416 (1982).

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[4] The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

Okla.Stat. tit. 20, §1602 (1981).

Supreme Court, U.S.
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No. 84-1715
No. 84-1759

In The
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
*Petitioners,*

V.

SOLOMON LUSBY, et al.,
*Respondents.*

T.G.&Y. STORES, INC.,
*Petitioner,*

V.

SOLOMON LUSBY, VAUGHN LUSBY and ALVIN JERARD LUSBY,
*Respondents.*

## REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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### INTRODUCTION

COMES NOW the Petitioner, T.G.&Y. Stores, Inc., and pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, hereby files this Reply Brief addressed to the arguments raised in the Brief in Opposition filed by the Respondents. As this Court will

recall, two separate Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit have been filed in this consolidated matter. In the Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit the Respondents devote slightly over three (3) pages to the issues and arguments raised in this Petitioner's Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. However, in these three pages the Respondents make statements to which this Petitioner feels compelled to respond.

## ARGUMENTS OF THE RESPONDENTS

### A. The Effect of the Submission of Claims under 42 U.S.C. §1983.

Initially, the Respondents urge that because the jury found liability on various pendent state claims the result in this case would be the same, even if this Court should question whether the liability under 42 U.S.C. §1983 was appropriate. This statement fails to take into account the fact that the verdict forms used by the Court did not require the jury to separate damages on the particular claims except among actual, nominal and punitive damages. Thus, although the jury found in favor of the Respondents on various pendent state claims, it is impossible to determine the amount of actual damages which would have been awarded against this Petitioner had the §1983 claims not been placed before the jury. This very matter has previously been briefed and the Petitioner would refer this Court to Proposition II(A) of the Reply Brief of Appellants, T.G.&Y. Stores, Inc. and Charles Gent, filed in the United States Court of Appeals for the Tenth Circuit on May 9, 1983. Of course, the Petitioner has at all times taken the position that the §1983 claims were inappropriately placed in this lawsuit, and

thus, the District Court for the Western District of Oklahoma should not have continued to hear the pendent state claims.

In this connection, another factor which must be considered involves the finding of the United States Court of Appeals for the Tenth Circuit that the trial court erred in instructing the jury on future medical expenses. More specifically, the Tenth Circuit found that the Respondents did not present specific evidence suggesting they would require future medical treatment, and thus, it could not be concluded with reasonable certainty that any of the Respondents would require future medical care. The Tenth Circuit found that it was error for the trial judge to have instructed the jury about such future medical expenses, but concluded that it was harmless error that did not affect the jury's determination of damages. The Petitioner strongly asserts that the erroneous instructions regarding damages, when considered in conjunction with the trial court's error in submitting the §1983 claims to the jury, created an atmosphere wherein this Petitioner was deprived of a fair trial on all matters submitted to the jury.

One final consideration with regard to the effect of the §1983 claim is that concerning the large amount of attorneys' fees awarded by the trial court in this action. In Appendix C attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by this Petitioner, this Court will find a reproduction of the judgment entered by the trial court in this matter. This judgment provides that the amount of $53,665.00 was awarded as reasonable attorneys' fees, said amount being awarded pursuant to 42 U.S.C. §1988 and to be paid by this Petitioner. Although the Respondents asserted claims under 42 U.S.C. §1985(3) and 42 U.S.C. §1986, the jury found in favor of this Petitioner on each of those claims. Thus, in the

absence of the finding of liability under §1983, the trial court would have had no basis for the awarding of attorneys' fees in this matter.

The Petitioner strongly urges that the Respondents' argument that the result in this case would have been the same even without the §1983 claims being placed before the jury is totally erroneous. The Petitioner states that the §1983 claim strongly influenced the amount of actual and punitive damages awarded against it. Further, there can be no question that the finding of liability on the §1983 claim established an otherwise nonexistent basis for the awarding of attorneys' fees, said award exceeding the amount of actual damages awarded against this Petitioner by almost $30,000.00.

B. Application of the Issues Presented

The Respondents next argue that the issues presented by this Petitioner are wholly factual and present no novel question or conflict of law. The Respondents initially argue that this Petitioner does not challenge the trial and appellate courts' findings that its employee, Charles Gent, acted under color of law. The Petitioner is uncertain why Respondents have made this statement, as all courts involved in this case have previously and correctly recognized that there can be no liability on the part of this Petitioner based upon a respondeat superior theory. (Instruction No. 14 and p. 13a of Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit). In any event, Rule 19.6 of the Rules of the Supreme Court of the United States clearly will make Charles Gent a party herein should this Court grant the Petition for Writ of Certiorari. At that time, it will be appropriate to raise any challenge to the trial and appellate courts' finding that Charles Gent acted under color of law. It should be noted that Charles Gent has previously raised questions regarding the appropriateness of the finding of liability

as to him, particularly directed to whether he was entitled to a good faith defense instruction. Thus, Charles Gent supports the position of the Petitioners herein in favor of granting the Petition for Writ of Certiorari.

The Respondents argue that the only issue raised by the Petition for Writ of Certiorari is limited to the facts established by the evidence in this case. As a result, the Respondents state that because the determination of the question presented depends on the unique facts occurring in conjunction with this incident, there is no question of law which would impact on future litigants worthy of merit by this Court. Of course, the only issue presented in each and every case before this Court is to some degree based upon the particular facts and circumstances existing in that case. However, this does not preclude the applicability of this Court's decision to numerous other cases. As the Petitioner has previously asserted, the issues before this Court are of concern to every private individual and entity in the United States. The decision reached by the United States District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit, has created a situation in which each private individual and entity is potentially liable under the provisions of 42 U.S.C. §1983 even though that private individual or entity does not act in concert with a state entity or under color of law. Therefore, the scope of the protections of 42 U.S.C. §1983, and its application to the conduct of private individuals or entities, are involved in this Petition for Writ of Certiorari. Accordingly, the questions of law presented herein are extremely important to a wide variety of future litigants in every court faced with similar questions.

### C. The Evidence

The Petitioner has never ignored the evidence presented at the trial court level, and presents this case in the posture of the findings of the Tenth Circuit for the

convenience of this Court in its determination of whether to grant the Petition for Writ of Certiorari. The Petitioner strongly disagrees with any suggestion that there was substantial and competent evidence presented at the trial court level justifying the finding that this Petitioner acted under "color of law". This Court has been presented with totally diverse opinions as to whether the evidence presented justifies any finding of liability on the part of this Petitioner under 42 U.S.C. §1983. The only method by which this conflict can finally be resolved is for this Court to review the trial court record.

In reviewing the summary of the evidence contained on p. 19 of the Respondents' Consolidated Brief, the Petitioner strongly asserts that the evidence contained in that summary is not sufficient to invoke the provisions of §1983. Even if each and every statement contained therein is accepted as true, those statements do not establish a sufficient basis for finding that this Petitioner acted under "color of law". This Petitioner reurges that there was no evidence presented in the trial of this action establishing any willful participation in a joint activity with the City of Lawton, and there was no evidence presented establishing that the Petitioner had any knowledge of the policies and customs of the City of Lawton.

It is somewhat incredible that the Respondents argue that the Petitioner created a scenario in which it had the authority to bring its own criminal charges by initiating a citizen's complaint because it knew that the City of Lawton would not exercise any check on such charges. Such an allegation is totally unsupported by the evidence in this case, which demonstrated at most the mere filing of a citizen's complaint by a private individual or entity by the use of the exclusive method presented by the City of Lawton. Although the Respondents attempt to use the off-duty status of Charles Gent in



establishing the "color of law" requirement, this device has previously been correctly rejected by both the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

D. The Appellate Court Opinion

The Petitioner disagrees with the Respondents reading of the appellate court opinion herein. While the Respondents urge that the demand of a release of civil liability was one of the acts which caused the violation of their constitutional rights, and that somehow the alleged abuse of the statute can be separated as a basis for liability from a basis for "color of law", the Petitioner disagrees. In its opinion, the Tenth Circuit necessarily must have found that the Petitioner was acting under color of law when it failed to dismiss the charges; otherwise, there could have been no finding of liability for those acts.

The question that must be determined is whether the Tenth Circuit found that the Petitioner had continuously acted under "color of law" from the moment of the filing of the citizen's charges, or, alternatively, whether the Petitioner acted under "color of law" at the time of filing the charges, and subsequently acted under "color of law" at a separate point in time when it allegedly used the charges as a "bargaining chip" in exchange for the release of civil liability. There can be no doubt that the Tenth Circuit did conclude that the Petitioner acted under color of law when bargaining for the release of the civil liability. Accordingly, the Petitioner believes that it appropriately presented its second question as being whether action under color of state law is present under §1983 when a private merchantile establishment seeks to obtain a release for all civil liability from a suspected shoplifter in exchange for the dismissal of all criminal charges brought by way of a citizen's complaint.

## RECENT DECISION OF IMPORTANCE

One final matter that must be brought to this Court's attention concerns its recent decision in the case of *City of Oklahoma City v. Tuttle*, Case No. 83-1919. This matter was before the Court on a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Certiorari was granted because of the Court of Appeals' holding that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability. In this Court's decision it reviewed the trial court's instruction on municipal liability which included language that "... but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." After considering the applicability of §1983 to the facts of that case, this Court concluded, at p.12 of the slip opinion:

> ...But unfortunately for respondent, the instruction given by the District Court allowed the jury to impose liability on the basis as such a single incident without the benefit of the additional evidence ...
>
> ... We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a §1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The foregoing discussion of the origins of *Monell's* "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability

> under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple".

The Court further concluded, at p. 15:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Upon the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a non-policymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly *Reversed.*

The Petitioner believes that this Court should be informed that the identical language found to be lacking in *Tuttle* was contained in the instruction given to the jury in the case at bar. (Instruction No. 15). In light of the reversible nature of such an instruction the Petitioner

would respectfully suggest that this Court might consider remanding this case to the United States Court of Appeals for the Tenth Circuit with directions to reconsider its opinion.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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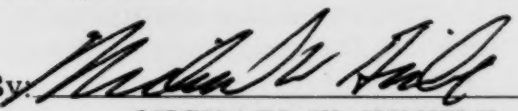
By: 

MICHAEL W. HINKLE
Counsel for Petitioner

September, 1985

## CERTIFICATE OF SERVICE

I, Michael W. Hinkle, a member of the Bar of the Supreme Court of the United States and counsel of record for T.G.&Y. Stores, Inc., Petitioner herein, hereby certify that on August 30, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Reply to Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties herein, as follows:

On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Jack L. Kinzie and Gretchen A. Harris, and to Linda G. Scoggins, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

On the City of Lawton, Oklahoma, a separate Petitioner herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Russell D. Bennett, the above named Petitioners' counsel of record, at 103 S.W. 4th Street, Lawton, Oklahoma, 73501.

All parties required to be served have been served.

Dated September 3, 1985.

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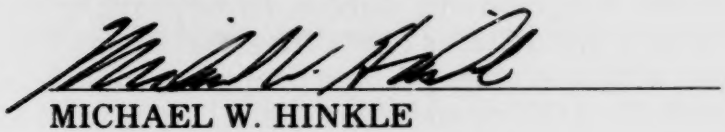

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